

combination or otherwise, is sufficient to put in operation the power vested in congress by the constitution to promote the progress of science and useful arts by securing to inventors exclusive rights.

We refer to the topic of the utility of complainant's chair only as it bears on the point of invention. One of the defendants testified that a chair made in accordance with the patent in suit would not be a practical commercial article; and it appears by the evidence of the plaintiff that, although at the time he testified he had owned this patent for seven years, he never had put on the market a chair constructed to conform to it. To fill an order he had commenced some 15 dozen, which were not completed at the date of his deposition.

This is not an instance where a valuable invention lies dormant for want of means of developing it; because the complainant also testified that he manufactures nothing but patent chairs of various kinds, and sells these to the extent of 70,000, more or less, annually. A novelty which remains unused so many years in the hands of an extensive manufacturer, exclusively engaged in the special trade to which it relates, must be presumed to involve, at the best, a very low degree of that useful invention which the patent code of the United States requires. Indeed, the entire field shown by the exhibits in this case seems a dreary one, nowhere enlivened by a single exhibition of the genius of invention, or of the "happy thought" which, under the patent laws, frequently answers in the place of the former.

We think the sum of all that can be said is that the complainant's novelty shows somewhat more mechanical skill, experience, and aptitude than those which preceded it, but not enough to rise above the conditions described in *Hollister v. Manufacturing Co.*, 113 U. S. 59, 73, 5 Sup. Ct. Rep. 717.

Bill dismissed, with costs for the defendants.

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CALIFORNIA ARTIFICIAL STONE PAV. CO. v. STARR *et al.*

(Circuit Court, N. D. California. August 29, 1892.)

No. 11,449.

PATENTS FOR INVENTIONS—INFRINGEMENTS—CONCRETE PAVEMENTS.

Reissued letters patent No. 4,364, granted May 2, 1871, to John Schillinger for an improvement in concrete pavements, consisting in dividing the pavement into blocks by the interposition of strips of tarred paper or equivalent material, so that each block may be removed and repaired separately, is infringed by a sidewalk laid in two layers, the bottom one of coarse cement, separated into blocks by scantling joints, and the top one of fine cement, divided while plastic by a trowel or other cutting instrument, on lines coincident with the scantling joints, so as to induce the cracking to follow such joints, rather than the body of the block. *Hurlbut v. Schillinger*, 9 Sup. Ct. Rep. 584, 130 U. S. 456, followed. *Paving Co. v. Schaltecke*, 7 Sup. Ct. Rep. 391, 119 U. S. 401, distinguished.

**At Law.**

Action by the California Artificial Stone Paving Company against Mary A. Starr and others for infringement of reissued letters patent No. 4,364, granted May 2, 1871, to John Schillinger, on the surrender of original patent No. 105,599, granted to him July 19, 1870, for an improvement in concrete pavements. Judgment for plaintiff. The claims of the patent are as follows:

"(1) A concrete pavement laid in detached blocks or sections, substantially in the manner shown and described. (2) The arrangement of tar paper, or its equivalent, between adjoining blocks of concrete, substantially as and for the purpose set forth."

The advantage of the invention is stated to be that this arrangement "allows the blocks to heave separately from the effects of the frost, or to be raised or moved separately, whenever occasion may arise, without injury to the adjacent blocks."

*Edmund Tauszky and Wheaton, Kalloch & Kierce, for plaintiff.*

*Parker & Eells, for defendants.*

**McKENNA**, Circuit Judge, (*orally*.) I am constrained to render judgment for plaintiff. The action is for the infringement of the Schillinger patent for artificial stone pavements. It has been interpreted so often as to leave nothing new to be decided or announced about it, and it has been extended and indulged very far. In *Hurlbut v. Schillinger*, 130 U. S. 456-465, 9 Sup. Ct. Rep. 584, the supreme court say:

"The invention consists in dividing the pavement into blocks, so that one block can be removed and repaired without injury to the rest of the pavement; the division being effected by either a permanent or temporary interposition of something between the blocks."

A pavement laid in two layers, a bottom one of coarse cement and a top one of fine cement, and the division of the upper one, while plastic, by a trowel or other cutting instrument, on a line coincident with the line between the sections in the lower layer, so as control the cracking, and induce it to follow the joints of the divisions, rather than the body of the block, "accomplishes the substantial result of Schillinger's invention in substantially the way devised by him, and is within the patent as it stands after the disclaimer." 130 U. S. 465, 9 Sup. Ct. Rep. 584. The defendant's pavement was so laid. The marking it on the sections formed by the scantling joints, so called, produces this result, hence must be held an infringement. The markings into blocks within such sections do not do this, hence are no infringement.

It is urged that in *Paving Co. v. Schalicke*, 119 U. S. 401, 7 Sup. Ct. Rep. 391, it was held that marking the upper course with a cutting instrument to the depth of about one sixteenth of an inch, for ornamental purposes, was not an infringement, and it is further urged that the testimony in the case at bar shows the marking only to have been done for ornamental purposes. But in *Paving Co. v. Schalicke*, the court say that it was not shown that the marking in that case produced any such division in blocks as the patent speaks of, even in degree:

"There were no blocks produced, and of course there was nothing interposed between the blocks. \* \* \* The marking was only for ornamentation, and produced no free points between the blocks, and the evidence as to the condition of the defendants' pavements after they were laid shows that they did not have the characteristic features above mentioned as belonging to the patented pavement."

In the case at bar the defendants' pavements have the characteristic features belonging to the patented pavement. Its object was attained. To clear up what was doubtful in the oral testimony, I inspected the pavement. The cut in the upper layer was directly over the line of the two sections formed by the scantling joints, and the cracking followed the cut, and not the body of the section. A section was selected by counsel for plaintiff and defendants, to see if one section could be removed without injury to the other; that is, would come up separately. The trial was successful. The sections easily separated on the line of the crack between them. All the objects of the patent, as interpreted by the decisions, *supra*, were shown to be attained.

It is further claimed by defendants that marking on the line of the scantling joints is not marking into blocks, within the meaning of the patent. In *Paving Co. v. Schallicke*, *supra*, the defendants laid their pavement in strips from the curb of the sidewalk inward to the fence in one mass, and then marked the strip crosswise with a blunt marker to the depth of about one sixteenth of an inch, and it was held no infringement. It does not appear from the opinion how wide the "strips" were, but in *Hurlbut v. Schällinger* the sections were 7 or 8 feet by 4 feet. These were held to be blocks, within the meaning of the patent. In the case at bar the sections are 6 by 10, some 6 by 11 feet; but from the appearance of the pavement some were smaller,—maybe 3 by 6. These sections, by virtue of the authority of *Hurlbut v. Schällinger*, must therefore be held to be within the definitions of the patent.

It may also be observed that the defendant Perine could have marked his pavement for ornamental purposes, and have avoided coincidence with the line between the sections. He did not avoid this coincidence, but selected it, and attained thereby the objects of the patent, and he must be held to have infringed it. The defendants laid \_\_\_\_\_ feet of pavement, and it is agreed that the charge therefor shall be 4 cents per foot, amounting to \$\_\_\_\_\_. Let judgment be entered accordingly.

## EDISON ELECTRIC LIGHT CO. v. UNITED STATES ELECTRIC LIGHTING CO.

(Circuit Court of Appeals, Second Circuit. October 4, 1892.)

## 1. PATENTS FOR INVENTIONS—INVENTION—INCANDESCENT ELECTRIC LAMPS.

The second claim of letters patent No. 223,898, issued to Thomas A. Edison, January 27, 1880, for an incandescent electric lamp, consisting of a combination of carbon filaments with a receiver made entirely of glass, from which the air is exhausted, and conductors passing through the glass, is valid, since, in view of the prior state of the art, it required invention to substitute a carbon filament for the platinum wire of his prior French patent, (No. 130,910, May 28, 1879,) and so combine it with a vacuum vessel as to prevent the disintegration of the carbon by "air washing."

## 2. SAME—SUFFICIENCY OF DESCRIPTION.

The word "filament," used as descriptive of the size of the burner, is sufficiently definite, in view of illustrations in the specification, and it is not necessary that its maximum and minimum dimensions should be specified, especially since defendant's burners indisputably lie wholly on one side of the dividing line between rods and filaments.

## 3. SAME.

The fact that the patent did not detail the method always used by the patentee, of passing a current through the filament during the process of exhausting the bulb, does not render the patent void for want of a sufficient description to enable a person skilled in the art to construct a successful lamp; for the patent called for a nearly perfect vacuum, and this process of obtaining it had been described in Edison's French platinum patent, and the necessity for it, in order to obtain a perfect vacuum, had been pointed out by Sawyer and Man, and would therefore naturally be resorted to by one familiar with these publications.

## 4. SAME—RESULTS NOT FULLY UNDERSTOOD.

The fact that this process produces a carbonization of the filament, and is now used as part of the process of carbonization, whereas the patent merely directs that the filament be "properly carbonized," does not show a suppression of a necessary element of the invention, or a want of sufficient description; for, it being apparent that one skilled in the art would use this method, it is immaterial that its full beneficial effect was not understood at the time of the application.

## 5. SAME—LIMITATION BY FOREIGN PATENT.

A prior Canadian patent, issued for 5 years, and extended for the further period of 10 years, should be regarded as having a continuous term for the entire period, and as not limiting the United States patent to any shorter term. *Refrigerating Co. v. Hammond*, 9 Sup. Ct. Rep. 225, 129 U. S. 164, followed.

## 6. SAME.

The Canadian patent act, which provides that "when a foreign patent exists, the Canadian patent shall expire at the earliest date at which any foreign patent for the same invention expires," refers only to foreign patents which exist before the issue of the relevant Canadian patent.

## 7. SAME—LIMITATION ON FACE OF PATENT.

The failure to limit the patent on its face to a shorter term than 17 years, so as to expire at the same time with the prior foreign patent having the shortest term, does not affect its validity. *Refrigerating Co. v. Hammond*, 9 Sup. Ct. Rep. 225, 129 U. S. 164, followed.

## 8. SAME—CERTIFICATE OF CORRECTION BY COMMISSIONER.

The commissioner of patents has no jurisdiction to alter a patent by a certificate of correction. Such a certificate is wholly void, and the patentee's request to have the same made cannot be considered as a surrender of the original patent.

## 9. SAME—ABATEMENT BY DISSOLUTION OF COMPLAINANT.

Notwithstanding the merger of the complainant with another company into a new corporation, the law of the state of New York, providing that pending suits shall not be deemed to have been abated or discontinued by reason of any such consolidation, is effective to prevent such abatement in a federal court.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Equity. Bill by the Edison Electric Light Company against the United States Electric Lighting Company. The suit was originally